No. 01-9

Supreme Court, U.S.
FILED
AUG 1 2001

IN THE

Supreme Court of the United States

LAFFIT PINCAY, JR., and CHRISTOPHER J. MCCARRON,

Petitioners,

—v.—

VINCENT S. ANDREWS, ROBERT ANDREWS, and VINCENT ANDREWS MANAGEMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether, in an action alleging a scheme to defraud under 18 U.S.C. §§ 1961-1968, the Racketeer Influenced and Corrupt Organizations Act, the United States Court of Appeals for the Ninth Circuit properly held that the statute of limitations began to run when Petitioners received, reviewed, and signed express written disclosures where

(a) the written disclosures expressly stated that Respondents were receiving the compensation that Petitioners challenged in this case, *Pincay v. Andrews*, 238 F.3d 1106, 1107-08, 1110 (9th Cir. 2000); and

(b) the Ninth Circuit held that a clearer case of written disclosure sufficient for inquiry notice was "hard to imagine", *id.* at 1110.

Corporate Disclosure Statement

Pursuant to SUP. CT. R. 15 and 29.6, Respondent Vincent Andrews Management Corporation hereby states that it hás no parent corporations, and that no publicly held company owns 10% or more of its stock.

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Statement of the Case

Petitioners have attempted to build a RICO case on the theory that Respondents had breached certain alleged terms of an oral contract which were disputed, and which were contradicted by the express terms of numerous written documents that Petitioners received over a long course of dealing with Respondents. Assuming *arguendo* that a RICO case could ever be built on such a basis,[1] the sole question here is whether, when the alleged terms of the oral contract are expressly contradicted by repeated written disclosures, those written disclosures suffice to at least create inquiry notice for purposes of the RICO statute of limitations.

The Ninth Circuit, after reviewing the factual record before it, held that the written disclosures did put Petitioners on inquiry notice; indeed, it held that it would be "hard to imagine a clearer case" in which the disclosures created inquiry notice. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2000).

Petitioners offer nothing remotely adequate to warrant this Court's review of the Ninth Circuit's decision. Petitioners' principal argument here was never even presented below, and therefore, never considered by the circuit court (*see* Point I, below). Petitioners also rely on misstatements of the factual record (*see* Point II, below). In any event, the arguments Petitioners offer, and the purported circuit split they posit, rest on a basic misreading of statute of limitations law (*see* Point III, below). Finally, Petitioners' proposed tolling rule is necessarily wrong as a matter of policy—it would allow long and well-documented courses of dealings to be

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[1] Even the district court noted that Petitioners changed "theories about every four minutes", Appendix A at 1A, resulting in what it described as a "ridiculous type of RICO case." 2A.

thrown into question retroactively simply by the allegation that repeated and express written disclosures were in conflict with the alleged terms of a prior, oral contract. (*See id.*).

In 1967, Petitioner Pincay entered into an oral agreement with Vincent Andrews, Sr., the father of Respondent Vincent Andrews ("Andrews"), to serve as his business manager. Upon the father's death in 1969, Pincay reaffirmed that oral contract with Andrews, acting through Vincent Andrews Management Company ("VAMC"). McCarron orally agreed to retain VAMC in 1979. VAMC handled its clients' financial, accounting, and tax matters, charging its clients (including Petitioners) a flat fee of 5% of their professional income.

In addition to serving as Petitioners' business manager through VAMC, Andrews and, beginning in the mid-1970s, his brother Robert were involved in limited partnerships that they often managed.[2] Respondents offered these investments to Petitioners, other clients, and investors who were not Respondents' clients. Petitioners' entire case—including their RICO claim—is based on the claim that Respondents had undisclosed interests in, and received undisclosed compensation from, the ventures in which Petitioners invested, beyond the 5% fee VAMC received for management services.

In the mid-1980s, Petitioners' deductions from one highly-leveraged tax shelter partnership were disallowed because of wrongdoing by the entity in which the partnership (along with many others) was a passive investor.[3] And the 1986 tax reform legislation reduced

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[2] These ventures were (as Petitioners stipulated) separate from VAMC, though many (such as Andrews & Co. or Higgins-Andrews) carried the Andrews name.

[3] *See, e.g.*, Appendix C, at 1C-2C.

the value of some of Petitioners' other investments. That, among other things, led Pincay to fire VAMC in late 1987; McCarron did the same in early 1988. They filed suit in March and August 1988, respectively.

At trial, Petitioners sought to overcome their statute of limitations problems by claiming that their fiduciary relationship with Respondents excused them from any obligation to investigate any potential claims. In connection with each of the partnerships, however, Petitioners had received written disclosures, many of which were only one or two pages long, that clearly disclosed the interest of Vincent or Robert Andrews or their affiliates, such as Andrews & Co. or Andrews & Co., Inc., often in the first or second paragraphs.[4]

Petitioners testified that they read and understood at least some of these partnership documents; that they were not prevented from reading any of them; and that they signed several forms specifically consenting to the compensation of Andrews, Robert Andrews, or their affiliates for their efforts in finding, evaluating, and managing the partnerships.[5] The Ninth Circuit held, as a matter of law, that the disclosures Petitioners received, read and signed put them on inquiry notice by 1980 at the latest regarding their claims, and thus held Petitioners' RICO claims (the only claims at issue on appeal) were barred by the statute of limitations.

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4 *See* Appendix B, at 1B-4B.

5 *See, e.g.*, 5B-8B.

Argument

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' ARGUMENTS HERE WERE NEITHER PRESENTED TO NOR CONSIDERED BY THE NINTH CIRCUIT

Petitioners here, for the first time, claim that the United States Courts of Appeal for the Seventh and Eighth Circuits have adopted a "no bare access" accrual rule, pursuant to which the RICO statute of limitations commences only when plaintiff has access to "necessary information" *and* is aware of a "suspicious circumstance" that causes plaintiff to review that information. Pet. at 7-12.[6] Petitioners, who never presented this theory during the thirteen years this case has lasted, now claim that the Ninth Circuit erred in not applying that rule. Because this issue forms no part of the judgment from which Petitioners now seek relief, it is not properly presented here and the Petition should be dismissed on this ground alone.

"[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (internal quotations and citation omitted); *see Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (internal quotations omitted). This principle helps "to maintain the integrity of the process of certiorari." *Taylor*, 503 U.S. at 646.

This case does not present any compelling reasons, *see* SUP. CT. R. 10, to depart from that practice. As shown below, there is no conflict between the circuit courts because no circuit has adopted the accrual rule

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[6] Citations to the Petition are noted as "Pet."

that Petitioners posit here as the basis for the alleged conflict. Rather, the issue here is simple: as the Ninth Circuit found, it is "hard to imagine" a clearer case of disclosure for purposes of providing inquiry notice to plaintiffs. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2000). But even if there were some basis for Petitioners' purported accrual rule, certiorari should not be granted because the Ninth Circuit was not given an opportunity to address Petitioners' arguments.

II. PETITIONERS RELY ON MISSTATEMENTS OF THE RECORD BELOW AND CONTRADICT THEIR OWN TRIAL TESTIMONY

Petitioners also misrepresent material facts, including as follows: Petitioners assert that the 5% business management fee included investments, *see* Pet. at 2, and therefore, that Respondents breached their agreement with Petitioners by receiving additional compensation therefrom. But Petitioners stipulated before the trial court that the alleged terms of their oral contracts were the same, and the same as the alleged terms of Pincay's oral agreement with Vincent Andrews, Sr. in 1967. And it was undisputed that, in 1967, Andrews' father was not involved in any partnership investments. Thus, contrary to Petitioners' contention, the record shows that neither party to the 1967 oral agreement contemplated—much less agreed—that future partnership ventures would fall within the scope of the alleged oral management agreement.

Petitioners' claim that neither Pincay nor McCarron understood the partnership agreements, and that they blindly trusted Respondents to steer them correctly, is also contradicted by Petitioners' own testimony. Pincay, for example, testified that he knew that Andrews was involved in at least some of the part-

nerships,[7] and understood that it was ultimately his decision whether to invest.[8] Pincay admitted that he spoke English regularly and conducted his business in English. And Pincay's wife Linda (who spoke English as her first language) also spoke to Andrews about the partnerships, and prior to her 1985 death signed most of the documents with her husband.[9]

McCarron also admitted knowing that Andrews was involved in at least some partnerships,[10] and that it was his "standard practice" to try to read documents from VAMC.[11] Indeed, McCarron chose to stop investing in oil and gas ventures, and chose not to invest in a horse-stock partnership that Andrews' wife was forming—not because Andrews was involved, but because of the risk involved.[12]

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT AND IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Petitioners fail to address the substance of this Court's decisions in *Rotella v. Wood*, 528 U.S. 549 (2000) and *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). Those decisions addressed the question of when RICO claims accrue and are dispositive of Petitioners' claims here. The Ninth Circuit correctly stated and applied the legal standard announced in those cases. As shown below,

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7 *See* 3A.

8 *See* 4A-5A.

9 *See* 6A-9A.

10 *See* 10A.

11 *See* 11A.

12 *See* 12A.

even assuming Petitioners' new theory could properly be considered here, although not presented below (*see* Point I, above), that theory either:

- takes an unworkably radical position, asserting that even in a case of express disclosures that were as clear as possible for purposes of inquiry notice (as the Ninth Circuit found here), defendant's fiduciary status overrides the possibility of inquiry notice, or
- simply quarrels with the way the Ninth Circuit viewed the express disclosures on the facts of this case.

Neither position has merit, and neither is of a character to warrant this Court's intervention.[13]

A. The Supreme Court Has Already Considered and Rejected Petitioners' Contentions Regarding Accrual

Petitioners simply fail to cite *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997), and only note *Rotella v. Wood*, 528 U.S. 549 (2000) in passing, for the proposition that the RICO statute encourages plaintiffs to diligently investigate their claims. *See* Pet. at 16. But those cases, which rejected efforts to extend the four-year RICO statute of limitations, are dispositive of the issues presented here—both because the Ninth Circuit applied the correct rule of law, and because the facts of this case confirm the soundness of those decisions.

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[13] A Petition based on nothing more than an objection to the manner in which an appellate court applied a rule of law under the correct standard of review is inappropriate. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Rotella unanimously rejected the "injury and pattern discovery rule", in part, because such a rule would undermine RICO's "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." 528 U.S. at 557-58 (citing *Klehr*, 521 U.S. at 187) (in turn citing *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987)). *Rotella* also noted that the "injury and pattern discovery rule" would permit, for example, a limitations period to begin to run "only eight years after a claim became ripe", which "would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." 528 U.S. at 559. *See also Klehr*, 521 U.S. at 187 (rejecting "last predicate act rule" because it would allow plaintiff "simply to wait, 'sleeping on their rights', . . . bringing suit only long after the 'memories of witnesses have faded or evidence is lost' ") (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

This action—in which Petitioners claimed to be victims of a RICO scheme based on an alleged oral agreement whose terms dated to 1967—vividly illustrates the wisdom of *Rotella* and *Klehr*. The essence of Petitioners' claim here is that they were excused from any showing of reasonable diligence because the parties were in a fiduciary relationship. That assertion is flatly contrary to this Court's decisions in *Rotella* and *Klehr*, which affirmed that the nature of the remedies available under the RICO statute requires that plaintiffs be diligent in acting on information that comes to their attention.[14] Thus,

[14] This is emphasized by the fact that in both cases, the Court noted that the statute of limitations could be extended through equitable tolling *only* where a plaintiff has demonstrated diligence. *Rotella*, 528 U.S. at 561, ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."); *see also Klehr*, 521 U.S. at 194 ("a plaintiff who is not reasonably diligent may not assert 'fraudulent

Petitioners are actually asking this Court to revisit and limit its recent decisions in this area, without presenting any reason (much less a compelling reason) to do so.

One of the principal reasons for a statute of limitations, and for the parol evidence rule, is to preclude a party who has had the benefit of a bargain for a long time from turning around and crying fraud based on unverifiable allegations of long-ago conversations and alleged oral agreements that contradict later, written agreements. To find that clear, written, *signed* securities disclosures can be ignored by a plaintiff who then sues for RICO fraud would contravene these rules, violate public policy encouraging reliance on written disclosures, and greatly complicate routine business transactions—forcing professionals to take self-protective efforts that accord clients little additional protection from actual fraud or malfeasance while imposing greater costs on all involved.

B. The Petition is Improper and Should be Denied Because the Asserted Error Concerns the Manner in Which the Ninth Circuit Applied the Correct Rule of Law

In fact, Petitioners' proposed "no bare access" accrual rule amounts to no more than an objection to the way that the Ninth Circuit applied settled law to facts that were admitted or undisputed. Petitioners insist that, in assessing when inquiry notice occurs, courts should not assume that a plaintiff has knowledge of every document to which he or she has access (no matter how numerous), but rather should look to many factors, including plaintiff's access to the information, defendant's conduct in

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concealment.' "). In contravention of *Rotella* and without citing a single case that would support the result, the rule that Petitioners advocate here would make tolling the default, not the exception, in cases where the parties are in a fiduciary relationship.

concealing the alleged wrongdoing, plaintiff's opportunity to detect the fraud, and the relationship between the parties. Yet, as Petitioners' own authorities show, the Ninth Circuit already follows a multi-factored approach in determining inquiry notice, *see Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 459-61 (9th Cir. 1986) (listing factors court considers); *Luksch v. Latham*, 675 F. Supp. 1198, 1203 (N.D. Cal. 1987) ("any authority there may be to support adoption of the per se imputation rule urged by [defendant] is contrary to a wealth of Ninth Circuit law."), and did so here.

Specifically, the court below evaluated, *inter alia*, the relationship between the parties, *see Pincay*, 238 F.3d at 1109, the information contained in the disclosures that Respondents gave to Petitioners, *id.* at 1107-08, 1110, Petitioners' ability to access the information, *id.*, and the alleged oral agreement between the parties, *id.* at 1107. Far from assuming Petitioners' knowledge, the court below evaluated all of those relevant facts and determined as a matter of law that "no reasonable jury could find that Pincay and McCarron did not have constructive notice of their injuries before 1985". *Id.* at 1109. Thus, since the Petition reduces to an objection to the result that the Ninth Circuit reached, the Petition should be denied because the lower court applied the correct rule of law.

C. No Court Has Ever Adopted a "No Bare Access" Accrual Rule as Petitioners Describe it and, in Fact, Petitioners' Authorities Undermine Their Contentions Here

Nor is there merit to Petitioners' contention that the Seventh and Eighth Circuits follow a "no bare access" accrual rule that somehow conflicts with the decision below. Rather, the Seventh and Eighth Circuit cases cited in the Petition stand for the unsurprising rule that

plaintiff's ease of access to the information revealing defendant's wrongful conduct is a factor to be considered in assessing whether plaintiff had inquiry notice. *See Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997),[15] *Great Rivers Co-Op of S.E. Iowa v. Farmland Indus.*, 120 F.3d 893 (8th Cir. 1997), *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992), *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), *Richey v. Horner*, 244 F.3d 635 (8th Cir. 1992).

For example, while *Fujisawa* rejected the notion that plaintiff's access to "everything in a company's files" is sufficient to start the statute of limitation running at the time of acquisition, it also noted that

> the facts that put the victim of the fraud on notice can fall short of actual proof of fraud. How short may depend on the victim's access to the information that he will need in order to be able to plead a reasonably well substantiated and adequately particularized case of securities fraud, bearing in mind that before he files his suit he will not have the aid of compulsory process. The better his access, the less time he needs.

Id.

Here, Respondents' written disclosures gave Petitioners *all* of the information they required to be on notice of their claims. According to Petitioners' theory at trial, the 5% fee in their alleged oral contracts with VAMC precluded Andrews, his brother Robert Andrews, VAMC, or any other entity they controlled from receiving any compensation from any partnership in which Petitioners invested, and Respondents purportedly schemed—from 1969 through the late 1980s—to hide

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[15] Research has revealed no case other than *Fujisawa* that refers to "bare access" in a manner that is relevant to the accrual issue.

their compensation from Petitioners. Given that alleged scheme, Petitioners needed to expend little, if any, effort besides reading any of the dozens of documents they received to be on notice of their claims.

Petitioners claim, however, that the disclosures were defective because they did not state "explicitly or prominently, that Pincay and McCarron understood that the compensation referred to in the documents was in addition to 5% of their yearly income." Pet. at 13. How the disclosures could have been clarified is unclear and, in any event, such clarification would not have helped Petitioners' cause here. *See, e.g., Great Rivers Co-op.*, 120 F.3d at 897 ("[T]his requirement of some awareness does not mean that an injured party will necessarily avoid the statute of limitations by turning a blind eye to what is obviously in full view"); *McCool*, 972 F.2d at 1462 ("If a communication would have been no different if issued by an honest defendant, it cannot be an act of concealment."). Petitioners cite no authority for the proposition that, in addition to disclosing the relevant information, a disclosure must expressly provide that plaintiff understood the information conveyed.

At bottom, Petitioners' proposed new rule of law would relieve them of their obligation to show that they were reasonably diligent—contrary to the settled law of every circuit. *See, e.g., Fujisawa*, 115 F.3d at 1334 (plaintiff "should have learned [of the alleged fraud] through the exercise of ordinary diligence"); *Richey*, 244 F.3d at 638-39 (limitations period "may be triggered even though the victim is unaware of the misleading statements if, in exercising reasonable diligence, he should have discovered their misleading nature.") (citing *Great Rivers*, 120 F.3d at 896). Even the "suspicious circumstance" that Petitioners claim must be present in order to put a plaintiff on notice presumes that the plaintiff was diligent. *See Fujisawa*, 115 F.3d at 1335

("*How* suspicious the circumstances need be . . . will depend on how easy it is to obtain the necessary proof by a *diligent* investigation aimed at confirming or dispelling the suspicion.") (first italics in original, second italics added); *Davidson*, 973 F.2d 1391 ("[A] plaintiff may not ignore 'storm warnings' which would alert a *reasonable* investor to the possibility of fraud.") (internal quotations omitted, emphasis added). Petitioners cannot point to any place in the record that shows they exercised any diligence at all.

Instead, Petitioners claim that they had no duty to investigate because the parties were in a fiduciary relationship and Petitioners are relatively unsophisticated investors. Pet. at 17. The Ninth Circuit properly rejected Petitioners' assertion that they had no duty to investigate simply because Respondents were Petitioners' fiduciaries.[16] Indeed, Petitioners' own authorities fail to support their contentions here. *See*, *e.g.*, *McCool*, 972 F.2d at 1463 ("[I]t is apparent that the investors were relying on personal trust to protect their investments, not on legal documents. But neither easy mistakes nor trust toll the statute of limitations. Only diligence suffices."); *Hilton v. Munaw*, 522 F.2d 588 (9th Cir. 1975) (fiduciary relationship does not relieve one of all duties to inquire about potential fraud).

Nor can Petitioners claim that their lack of sophistication prevented them from being on inquiry notice. In *Great Rivers*, 120 F.3d at 897-98, the court rejected plaintiff's contention that he had no duty to investigate because he was an unsophisticated investor, holding that

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[16] Contrary to Petitioners' assertion, the Ninth Circuit considered and rejected their argument that constructive notice does not start the statute of limitations in a fiduciary case. *Compare* Pet. 16-17 (claiming that the Ninth Circuit's decision did not consider the fiduciary relationship) *with* Pet. A6-7 (rejecting Petitioners' argument concerning the fiduciary relationship between the parties).

the general and self-serving information plaintiff received in a single newsletter was sufficiently suspicious to trigger a duty to investigate. The case here is clearer: as the court below found, it is "hard to imagine" clearer disclosure for purposes of inquiry notice than was provided here, including signed, one-paragraph consent forms, and one and two-page documents that clearly disclosed Respondents' interest in the first or second paragraphs.

Petitioners received disclosures for each of the partnerships in which they invested (29 for Pincay, 13 for McCarron). Some of these disclosures revealed that Respondents would receive compensation in an amount greater than, or at least different from, 5%. Thus, even if Petitioners assumed that Respondents' compensation from the partnerships was included in the 5% flat fee, documents revealing rates other than 5% unquestionably triggered their duty to investigate. *See McCool*, 972 F.2d at 1463 ("While reasonable investors need not necessarily understand legal jargon, they must understand that contracts have *some* significance. Something is clearly amiss when the same piece of paper purports to mean different things on different occasions.") (emphasis in original). Under these facts, Petitioners' proposed rule would make tolling automatic and virtually irrefutable, regardless of the nature of the disclosures.

Finally, Petitioners' claim that there must be "undisputed evidence" in order for a court to find notice as a matter of law is simply wrong. Only one of Petitioners' cases even mentions "uncontroverted evidence", and does so in a way that suggests that Petitioners' "question presented"[17] should be answered in the negative. *See*

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[17] "Whether, in a suit against fiduciaries alleging mail and wire fraud . . . the jury's rejection of the fiduciary's assertion of the statute of limitation mandates a finding for Petitioners regarding that defense."

Great Rivers, 120 F.3d at 896 ("When uncontroverted evidence irrefutably demonstrates that a plaintiff had inquiry notice of fraudulent conduct, the issue of notice is amenable to summary judgment.") (citation omitted); *see also id.* at 897 ("[T]here might be circumstances where the evidence of awareness is so overwhelming that there is no genuine dispute on the issue for purposes of summary judgment.") (citations omitted); *Davidson*, 973 F.2d at 1402 ("Whether a plaintiff is on notice of the possibility of fraud is an objective question amenable to summary judgment. The court must determine whether the plaintiff possessed such knowledge as would alert a reasonable investor to the possibility of fraud.") (quoting *Hirschler v. GMD Investments Ltd. Partnership*, Fed. Sec.L.Rep. ¶95,919 at 99,563 (E.D.Va. 1991) (in turn quoting *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1370 (9th Cir. 1988))).[18]

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[18] Petitioners' remaining authorities also do not support their "no bare access" accrual rule, or a finding that the Ninth Circuit's decision below is in conflict with other federal courts. *See Cooperativa De Ahorro y Credito Aguada v. Kiddder, Peabody & Co.*, 129 F.3d 222 (1st Cir. 1997) (plaintiff's claims time barred because diligent inquiry would have revealed defendant's wrongdoing); *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351 (2d Cir. 1993) (plaintiff, regardless of length of the documents, had a duty to inquire when information was "clearly disclosed in a manner sufficient to put reasonable investor on constructive notice"); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987) (statute of limitations accrues when plaintiff should have discovered facts constituting his claim, regardless of relationship between the parties); *Beneficial Standard Life Ins. Co. v. Madriaga*, 851 F.2d 271 (9th Cir. 1988) (remanding to district court to determine whether plaintiff engaged in diligent investigation); *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983) ("[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.") (internal quotations omitted).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

Respectfully submitted,

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August 1, 2001

APPENDIX A

[14] MR. BOIES: Well, because this issue was briefed. The Court did not just sua sponte issue this order in June of 1996. This matter was briefed two and three times by both sides.

THE COURT: Well, I know but—

MR. BOIES: Your Honor, if I could—

THE COURT: —you missed a lot of the fun of this case.

MR. BOIES: Yes.

THE COURT: This thing, as I told you before, was like a moving and swinging target, depending upon which lawyer got to the podium at a given time. Mr. (pause)—

MR. BOIES: Papiano?

THE COURT: Mr. Papiano changed theories about every four minutes, and I don't mean this critical of Mr. Papiano. I'm not sure that he knew what theory he was really addressing. He just knew that there were some bad guys over there that hurt these good guys and the bad guys should pay for the good guys, and the jury might have understood that theory also.

But, in one sense, I'd sort of like to see what the final arguments were, but I'm not going to put us all through buying some transcript, though I guess one side or the other is going to have to buy some transcript eventually here anyway, and it will be an expensive transcript, but I'd * * *

[114] THE COURT: Or inadmissible.

MR. ESENSTEN: I agree.

MR. MCADAM: Your Honor, we have not talked about RICO.

THE COURT: No, I know we haven't.

MR. MCADAM: I've got a feeling.

THE COURT: Tell me what you think the RICO claim is.

MR. MCADAM: They committed acts of mail and wire fraud.

THE COURT: Which acts are they of the mail and wire fraud?

MR. MCADAM: They used t he mails, telephones to make these—

THE COURT: To get the five percent?

MR. MCADAM: —representations, concealments—

THE COURT: Excess of five percent?

MR. MCADAM: Correct. It was all part of the scheme and, essentially, that's what the game was all about. So you have an enterprise.

THE COURT: Other than attempts of RICO in copyright cases that we have had recently, I'd have to say this is really sort of a ridiculous type of RICO case, but I have previously ruled on a motion for summary judgment that there is enough to go to the jury, and I don't think this * * *

[108] Q. Is that yes?

A. Yes.

Q. Okay. When you saw the words "Andrews & Company", you thought of either Vincent or his brother Robert; is that right?

A. Vincent.

Q. So you weren't even confused by "Andrews & Company". You knew that once you saw the word "Andrews", that signified to you Vincent.

A. Yes.

Q. Now, let's go to page 2. Okay. Again, we are on paragraph 5G. Again, you didn't see that paragraph even going through it; is that right?

A. No, I didn't. Yes.

Q. Now, let's go to the last page. I'm not sure. Is it stipulated he signed it?

MR. PAPIANO: Well, I'd like to have the jury see the last page.

THE COURT: There is no stipulation.

MR. ESENSTEN: Okay.

Q. Let's turn to the last page.

MR. PAPIANO: Your Honor, part of the last page is taken off here in the left-hand corner. I'd like to have the jury see the entire last page.

MR. ESENSTEN: It says. "Sign here".

* * *

[101] BY MR. ESENSTEN:

Q. Did you make the decision to whether to go in this or not?

A. No. He made the decision.

Q. Well, maybe I asked a bad question, Mr. Pincay. Let me ask it this way:

Nobody forced you to go into these, did they?

A. No.

Q. And you had the right to say no if you wanted to, correct?

A. Yes.

Q. And you understood that you could have said no to any one of these partnerships?

A. Yes.

Q. And you also understood that you were a business management client of Vincent Andrews Management at the time you went into this partnership, right?

A. Yes.

Q. Was it your understanding that you could have stopped being a business management client of Vincent Andrews Management Corporation at any time?

A. Yes.

Q. But you continued to remain a business management client?

A. Yes.

[102] Q. Now, when this document was sent to you, exhibit 723—

MR. PAPIANO: Can we see the signature page on that?

MR. ESENSTEN: We stipulated he signed it.

THE COURT: All right. Let's go. Question.

BY MR. ESENSTEN:

Q. When you got this document, exhibit 723, did you understand that you could have decided not to sign it and not go into it?

A. Yes.

Q. But it was your decision to go ahead.

A. Yes.

THE COURT: Let me just again try to clarify. With reference to all of the partnership documents that you signed, did anyone force you to sign it?

THE WITNESS: No.

THE COURT: Did you realize as to all of the partnership documents that you signed that you didn't have to sign it if you didn't want to?

THE WITNESS: Yes.

THE COURT: And as to all the partnership documents that you signed, did you sign them voluntarily knowing that you were entering that partnership?

THE WITNESS: Yes.

THE COURT: All right. Go ahead.

* * *

[108] A. Well, I think he was comfortable. I mean there's no—

MR. PAPIANO: Objection, your Honor. Move to strike. Speculation.

THE COURT: Yes, what was said rather than what you thought.

THE WITNESS: Oh. Well, that he said he liked Ted Clifford and that he trusted him and, you know, I presented all the facts to Laffit and basically said, "You know, it's up to you. I'm going to show this to some other people, but it's up to you, whatever you want to do and it's your decision".

BY MR. ESENSTEN:

Q. While we are on the comfort level issue, you told us that you'd had conversations with Laffit and Linda Pincay over the years; is that right?

A. That's correct.

Q. When you would present some investments in person to Mr. Pincay, would you generally have the conversation with both Laffit and Linda Pincay?

A. Yes.

MR. PAPIANO: Objection, your Honor. Improper foundation.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. ESENSTEN:

[109] Q. Would you discuss the contents of the conversation with both of them?

A. Yes.

Q. Would you have conversations with both of them?

A. Yes.

Q. And we have seen a number of documents Linda also signed.

A. That's correct.

Q. Did she give her consent to you that she wanted to also go into the investment with her husband?

MR. PAPIANO: Objection, your Honor. Calls for speculation.

THE COURT: Overruled.

THE WITNESS: Yes.

* * *

[69] and felt that we could acquire these properties, this particular property, at a very reasonable price. We were able to get a mortgage, a good reasonable loan and we thought that this could become a good income-producing property to be held for a long-term appreciation.

I remember the Pincays saying that they were comfortable with the relationship with myself and Graham because our other investment had been working nicely and that they would be comfortable in investing in a particular property like this. In fact, I remember at this particular discussion that I think it was Linda said that she liked the idea that I was general partner because she felt I was in there helping to protect their particular investment, and if I made money, that was fine.

Q. Now, you just mentioned something about Linda Pincay. Did you have separate conversations with Linda Pincay that Laffit Pincay was not party to?

A. Many times.

MR. PAPIANO: Objection. Hearsay, your Honor.

THE COURT: Overruled.

THE WITNESS: Many.

BY MR. ESENSTEN:

Q. And over the years, did you have these conversations pertaining to these partnerships also?

A. Yes.

[70] Q. And did it pertain to the every-day business management things with Mr. and Mrs. Pincay?

A. Yes.

MR. PAPIANO: Objection, your Honor. Nor relevant to this action with respect to whether there is any agency or whatever is being claimed with respect to the deceased Linda Pincay.

THE COURT: Overruled.

BY MR. ESENSTEN:

Q. At times, would you speak to Linda Pincay more than you would Laffit Pincay?

A. I definitely spoke to her more than I spoke to Laffit.

Q. Why is that?

A. Linda would speak to our office almost every day. I might speak to her at times, certainly once a month, sometimes some months once a week, just it depended where I was, where they were. She was very involved in their business affairs and I spent an awful lot of time talking to her about all various matters, whether they were business management matters or their real estate matters, investment matters, whatever.

Q. And you understood she was a limited partner, didn't you?

A. That's correct.

Q. Now, I'm going to show you the front page of exhibit * * *

[29] Q. So you had no idea that Mr. Andrews was involved with Higgins-Andrews 1985, 1984, 1983, 1982 and 1981 before you terminated Mr. Andrews.

A. The only involvement I thought he had that he invested some money of his own.

Q. You didn't know he was a general partner.

A. No, I did not.

Q. You never saw anything that was handed to you that would show that he was a general partner.

A. That's correct.

Q. Now, please, sir, turn to exhibit 253. This is a letter to you dated September 18, 1985; is that right?

MR. PAPIANO: Excuse me. What exhibit number?

MR. ESENSTEN: 253.

Q. Is this a letter to you dated September 18, 1985?

A. Not, it is not.

MR. PAPIANO: Not on mine either.

MR. ESENSTEN: May I approach, your Honor?

MR. PAPIANO: May I also, your Honor, to see the document?

* * *

[38] and answer form booklet and that's where the deposition is from.

All right. You may read it.

MR. ESENSTEN: "QUESTION: Do you recall receiving any documents from Vincent Andrews Management Corporation at all?

ANSWER: Sure. I remember receiving documents from Vincent Andrews Management Corporation.

QUESTION: And did you review those documents when you received them?

ANSWER: There were times when I did, yes.

QUESTION: Did you have a standard practice as to whether you would review them when you received them from Vincent Andrews Management Corporation?

ANSWER: Yes, I did.

QUESTION: And what was that practice?

ANSWER: To read them and try and understand them the best I could."

Q. Now, let's look at a few partnership agreements. First, look at Monetary Associates, exhibit 698, and on the board it's the first page of exhibit 698, Partnership Agreement of Monetary Associates.

Now, sir, Monetary Associates, the agreement is dated October 12, 1979. This was some months, just a few months after you hired Vincent Andrews Management; is that * * *

[21] Q. Did there come a time when something was offered to you that you did refuse to invest in?

A. Yes.

Q. What were those circumstances?

A. Well, I told him I didn't want to be putting any more money into the oil, first of all; and the second one that I turned down was investing in stallion shares, blood stock, race horses.

Q. Would you explain to the jury what you mean by investing in stallion shares?

A. Well, Vinnie called me one day and said that—said that his wife, who was a blood stock agent, was putting together some partnership to invest in some of the better stallions that were standing in Kentucky, and—

THE COURT: What do you mean by "standing".

THE WITNESS: Okay. The studs, the stallions that are used for breeding purposes are kept at various farms in Kentucky, in Lexington, Kentucky, and throughout that whole region, and when we use the term "stand" that means that's where the horse resides and that's where the people take care of them, and some of the farms have 30, 40, 50 stallions at each place, and during the spring, they use

* * *

APPENDIX B

1B

PARTNERSHIP AGREEMENT
of
ADDISON ASSOCIATES

AGREEMENT made as of August 12, 1980, among the persons listed on Schedule "A" attached hereto, including Andrews & Company, Inc., the Managing Partner. The Managing Partner is a Connecticut corporation controlled by Robert Andrews.

1. NAME. The partnership [hereinafter the "Partnership"] shall be conducted under the name of ADDISON ASSOCIATES and shall be a partnership under the laws of the State of New York.

2. CHARACTER. The purpose of the Partnership is to make investments in various ventures which, in the opinion of the Managing Partner, will provide the possibility of capital appreciation, income and tax benefits to the partners, each of whom is in a high income tax bracket. The Partnership shall initially invest in The Securities Group 1980, a New York limited partnership, which was organized for the purpose of acting as broker-dealer and market maker in Securities, financial futures and foreign exchange, all as described in the Private Offering Circular for The Securities Group 1980, a copy of which, together with its accompanying documents, each partner acknowledges having received and read. As provided in Section 1.06 of the Limited Partnership Agreement for The Securities Group 1980, each limited partner shall be liable for recourse obligations in an amount equal to three times the original capital contribution. Accordingly, the partners (other than the Managing Partner, which shall make no capital contribution) shall, upon execution of this agreement, each contribute capital to the Partnership in the amounts set forth in Schedule "A" attached hereto, and such additional amounts upon which

they may from time to time mutually agree. Each partner (other than the Managing Partner) agrees to be personally liable to the Partnership for an amount three (3) times the contribution set forth opposite his name in Schedule "A" for recourse obligations of the Partnership to The Securities Group 1980. Each such partner agrees to contribute such additional amount to the Partnership as required in connection with the Partnership's obligations to The Securities Group 1980 immediately upon demand by the Managing Partner. Each partner (other than the Managing Partner) also agrees to contribute such additional funds as may be required, in the opinion of the Managing Partner, for necessary operating expenses of the Partnership if available funds are insufficient for such purposes.

3. TERM. The Partnership shall begin August 12, 1980 and shall terminate upon the first of the following to occur:

* * *

PARTNERSHIP AGREEMENT
of
FAIRVIEW ASSOCIATES

AGREEMENT made as of April 23, 1984, among the persons listed on Schedule "A" attached hereto, including Andrews & Company, Inc., the Managing Partner. The Managing Partner is a Connecticut corporation controlled by Robert Andrews.

1. NAME. The partnership [hereinafter the "Partnership"] shall be conducted under the name of FAIRVIEW ASSOCIATES and shall be a partnership under the laws of the State of Connecticut.

2. CHARACTER. The purpose of the Partnership is to make investments in various ventures which, in the opinion of the Managing Partner, will provide the possibility of capital appreciation, income and tax benefits to the partners, each of whom is in a high income tax bracket. The Partnership shall initially invest in OLENTANGY COMMONS LIMITED PARTNERSHIP (an Ohio Limited Partnership) ["Olentangy"], and in FRANKLIN PARK INVESTORS LIMITED PARTNERSHIP (a Michigan Limited Partnership) (the "Limited Partnerships") ("Franklin Park"). The investments are described in the Confidential Investment Summary prepared with respect to each limited partnership, a copy of which, together with the accompanying documents, each partner acknowledges having received and read. As provided in the limited partnership agreements for the Limited Partnerships, the investments of the limited partners thereof are to be made in installments of approximately 24% on initial subscription, approximately 24% on February 1, 1985 and in reduced installments on February 1, 1986, 1987 and 1988. The Partnership intends to invest in Olentangy and Franklin Park respectively, in an approximate rela-

tionship of 45 to 55. Accordingly, the partners (other than the Managing Partner, which shall make no capital contribution), shall, upon execution of this agreement, each contribute capital to the Partnership the amounts set forth in Schedule A and such additional amounts as the Managing Partner shall determine. Each partner (other than the Managing Partner) shall be personally liable to the Partnership for up to 3.1 times the initial contribution set forth opposite his name in Schedule "A" for recourse obligations of the Partnership to the Limited Partnerships. Each such partner agrees to contribute such required additional amount to the * * *

Taber Mill Company
c/o Related Housing Companies
Incorporated, General Partner
645 Fifth Avenue
New York, New York 10022

Re: Taber Mill Company

Gentlemen:

Robert Andrews, Esq. acted as my "Offeree Representative" (as that term is used in Rule 146 under the Securities Act of 1933) in connection with my purchase of a limited partnership interest in Taber Mill Company (the "Partnership"). The Offeree Representative has informed me that, except as set forth below, there are no material relationships between the Partnership or its affiliates and the Offeree Representative or his affiliates, which now exist or which are contemplated or which have existed at any time during the previous two years. The Offeree Representative has also informed me that, except as set forth below, no compensation has been received, or is to be received, as a result of such relationship.

Sincerely.

Residence Address:

5200 Los Grandes Way

Los Angeles, CA 90027

Dated: 5/30/80

/s/ LAFFIT PINCAY JR.
LINDA PINCAY
(Signature)

LAFFIT PINCAY JR.
& LINDA PINCAY
(Please Print Name)

Robert Andrews, (and persons and companies affiliated with Robert Andrews, collectively "Andrews") have assisted the Partnership in the placement of limited partnership interests. Andrews will receive compensation from the Partnership with respect to their participation in the placement of such interests, such compensation to be in the amount of five percent (5%) of the capital contributions to be paid by such investors.

In the past Andrews has assisted in the placement of partnership interests in other similar partnerships for which Andrews received similar compensation. It is anticipated that in the future Andrews will act in a similar capacity with respect to other partnerships similar to the Partnership.

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Sincerely.

Residence Address:

1078 Linda Glenn Drive

Pasadena, CA 91105

Dated: 5/30/80

/s/ CHRISTOPHER J. MCCARRON
(Signature)

CHRISTOPHER J. MCCARRON
(Please Print Name)

Robert Andrews, (and persons and companies affiliated with Robert Andrews, collectively "Andrews") have assisted the Partnership in the placement of limited partnership interests, Andrews will receive compensation from the Partnership with respect to their participation in the placement of such interests, such compensation to be in the amount of five percent (5%) of the capital contributions to be paid by such investors.

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